The New Set of EU Model Clauses for Service Providers

By Anthony Nagle, Karen Retzer, and Gemma Anderson

Introduction

After years of discussions, EU regulators have issued a new set of Standard Contractual Clauses to legitimize the transfer of personal data to countries outside the European Economic Area (EEA).[1] The new set of clauses reflects the reality that organizations subcontract and may be of particular use in the outsourcing arena and for intra-group transfers to centralized service centers. For the first time, organizations that outsource services involving personal data can transfer that data to their suppliers located outside the EEA, and those suppliers can in turn pass it to subcontractors for further processing, without the need for the customer organization to take any further steps. Such sub-processing of data is built into the terms of the new contractual clauses.

Decision 2010/87/EU[2] (the "Decision"), adopted by the European Commission in February 2010 (the "New Model Clauses") updates and replaces the prior existing Standard Contractual Clauses for Processors, approved by Commission Decision 2002/16/EC (the "Old Model Clauses") for the transfer of personal data outside the EEA by data exporters (the "Controllers") to data importers processing data on behalf of Controllers ("Processors").[3]

One of the key changes introduced by the New Model Clauses is that in certain situations the transfer of personal data from a non-EU service provider to its sub-processors will be "automatically" covered by the terms of the New Model Clauses.

Although some concerns regarding the New Model Clauses remain, the outsourcing industry (or organizations interested in centralizing data processing within the corporate family to affiliates located outside of the EEA) are likely to view the new changes as a positive step which provides further clarity about how organizations can comply with the EU data protection laws that govern such personal data transfers.

Customers and suppliers will need to incorporate some new processes and governance arrangements into their outsourcing and/or data transfer arrangements, in order to ensure they comply with all of the changes introduced by the New Model Clauses.

The previous transfer regime

Prior to February 2010, the European Commission had approved three sets of model contractual clauses: two types of Controller-to-Controller model contract clauses and one set of Controller-to-Processor model contract clauses (i.e., the Old Model Clauses).

However, to the ire of Controllers and Processors alike, the European Commission had never put in place any contract clauses to cover the transfer of personal data from Processor-to-Processor or Processor-to-sub-processor, which is a common feature in most data processing arrangements, in particular in outsourcing and intra-group transfers outside the EEA. When the Old Model Clauses were being developed, the European Commission also failed to build in a mechanism that would provide an automatic "flow-down" of provisions to sub-processors; this could have allowed adequacy[4] to be achieved under Article 25. In the absence of such a mechanism, Controllers and Processors have been complaining that they have to put additional contractual arrangements in place with sub-processors (i.e., in addition to the main services contract and processing agreements between the Controller and Processor), or that they have to

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implement other adequacy arrangements to ensure their compliance with Article 25. The New Model Clauses were developed to address this gap.

New Model Clauses: What are the main changes?

Sub-processors

The most significant change introduced by the Decision is that, for the first time since the Model Clauses were introduced, non-EU Processors are expressly authorized to appoint sub-processors, providing the following conditions are met:

1. the Processor informs the Controller of its intention to sub-contract all or part of the processing and obtains the Controller's prior approval in writing;

2. the sub-processor may only affect processing operations specified in the main contract between the Controller and the Processor, *i.e.*, the sub-processing cannot relate to a different set of processing requirements;

3. the Processor must enter into a written contract with the sub-processor which imposes the same obligations on the sub-processor as are imposed upon the Processor by the main agreement with the Controller, including the incorporation of third party beneficiary rights against the sub-processor (which will allow individuals to establish contractual claims directly against the sub-processor, but will be limited to the sub-processor's own processing operations), and the application of the law of the relevant EU Member State where the Controller is established, *i.e.*, this will be the governing law of the sub-processing contract. The New Model Clauses contain a guidance note which states that the requirement to enter into a written contract with the sub-processor may be satisfied by the sub-processor co-signing the contract entered into between the Controller and the Processor;

4. the Processor must give copies of its contracts with the sub-processor to the Controller;

5. the Controller must retain and annually update a list of sub-processing agreements concluded by, and with notification from, the Processor and this list shall be available to the Controller's DPA upon request;

6. the Controller must make available any contract for sub-processing to a data subject upon request (excluding commercial information); and

7. DPAs have audit rights against the Processor and sub-processor for the purpose of confirming whether the Processor and sub-processor have destroyed or returned all personal data to the Controller at the end of the contract.

Significantly, the New Model Clauses define sub-processor as "*any processor engaged by the data importer or by any other sub-processor of the data importer*", meaning that, to the relief of outsourcing customers and suppliers, entire chains of sub-processors (including sub-sub-processors and so on) will be covered by the New Model Clauses. This is something not all Member State DPAs have permitted in the past, for example, Hungary did not previously permit chains of sub-processors.

Liability

The liability provisions have also been updated by the Decision to reflect the introduction of sub-processing arrangements.

Processor to Controller. If the sub-processor fails to fulfill its protection obligations, the Processor remains fully liable to the Controller for the performance of the sub-processor's contractual obligations.

Controller/Processor/sub-processor to data subjects. Under the New Model Clauses, individuals may bring claims for a breach of their third party beneficiary rights or the provisions regulating the appointment and processing activities of a sub-processor against the sub-processor, where both the Controller and the Processor have factually disappeared, or ceased to exist, or become insolvent (although the claim will be limited to the sub-processor's own data processing operations).

New notice requirements

The New Model Clauses introduce a requirement to notify individuals about transfers to Processors if sensitive data are transferred. Sensitive data include information such as details on racial or ethnic origin, religious, philosophical or other beliefs, political opinions, membership in trade unions, health conditions and sex life, or information on judicial proceedings and criminal records. Also, perhaps in response to requests from US authorities, there is a new obligation imposed on the Processor to notify the Controller if it receives requests for disclosure from authorities. The Processor must also immediately inform the Controller about security breaches or access requests from individuals.

When do the New Model Clauses take effect?

The New Model Clauses will come into force on May 15, 2010. Notably, the New Model Clauses completely replace the Old Model Clauses and will not operate in parallel with them (in contrast to the two prior approved sets of Controller-to-Controller model clauses). Existing Controller-to-Processor contracts will continue to be valid only for the period that the transfers and data processing operations that are the subject matter of the contract remain unchanged. Although the precise extent of the "change" required to invalidate existing contracts is unclear, parties wishing to make changes to their processing agreements after May 15, 2010 will be required to enter into a new contract that complies with the New Model Clauses.

Also, for arrangements that include the use of sub-processors, the parties face the choice of either redrafting the arrangement with the Processor based on the New Model Clauses, or entering into Model Clauses with each sub-processor. As a result, and given the frequent use of sub-processors in existing service contracts, particularly in the outsourcing arena, many organizations will need to amend their existing agreements by putting the New Model Clauses in place for their outsourcing arrangements.

Practical considerations for customers and suppliers

The Decision expressly states that the New Model Clauses do not apply to Processors established in the EU (*i.e.*, those who perform processing on behalf of the Controller established in the EU) who sub-contract their processing to sub-processors established in countries outside the EEA. The approach of individual Member States of the EU will no doubt vary in this regard. One of the practical implications is that if a Processor is located within the EU and the sub-contractors that process data on its behalf are located outside the EU, the Controller may need to directly enter into the New Model Clauses with the sub-processor to comply with its obligations (unless it chooses another adequacy approach as outlined above). Controllers will need to understand how personal data flows in their outsourcing and/or data transfer arrangements to enable them to identify the correct processing entities that will need to enter into the New Model Clauses.

Although the New Model Clauses will be welcomed overall by Controllers as another tool to achieve compliance where sub-processing is involved, for some Member States, the New Model Clauses will place more onerous requirements on Controllers and on Processors to put arrangements in place with its sub-processors.

Controllers must make any contract for sub-processing available to individuals upon request, and this would include the New Model Clauses or any specific sub-processing agreements. However, the Controller does not have to make detailed security requirements for the processing (those that are contained in "Appendix 2" of the New Model Clauses) available to individuals, but it must provide a summary of those security requirements upon request. If the New Model Clauses or the sub-processing agreements contain any commercial information, it may be removed from the documents before providing them to the individuals. As a matter of good governance and to ensure the Controller can address any requests promptly, when the

New Model Clauses are being signed, Controllers and Processors may agree upon an appropriate version to make available to individuals who request a copy.

The Processor must also notify the Controller if: (i) it receives a request for disclosure from authorities (unless there is a confidentiality requirement); (ii) it receives an access request from individuals; or (iii) there is a security breach. The impact of this requirement is that a Processor may need to develop new governance arrangements with its sub-processors so that it gains access to this information as quickly as possible to enable it to promptly pass such information up the chain to the Controller.

The New Model Clauses permit DPAs to audit the full chain of sub-processing and (where appropriate) make binding decisions on the Controller, Processor and sub-processor under the applicable data protection law. In addition to the list of sub-processing agreements that the Controller must maintain as described above, the Processor is required to inform the Controller promptly of the existence of legislation applicable to it or any sub-processor, preventing any audit of the Processor or any sub-processor by the Controller's DPA. In practice, these requirements will place an additional burden on Processors and their sub-processors to establish whether their local legislation impacts the audit rights to which they will be agreeing under the New Model Clauses and any separate sub-processing agreements.

Finally, after May 15, 2010, Controllers will need to use the New Model Clauses for transfers to non-EU Processors and, with respect to existing contract arrangements, Controllers will need to be aware of, and monitor any amendments to, existing Controller-Processor arrangements that might trigger a requirement to amend existing contracts to include the New Model Clauses. Controllers should already be working with their Processors to establish the current "baseline" status of their processing arrangements relating to transfers outside the EEA and should then continue to monitor that baseline position from May 15 onwards, putting the New Model

Clauses in place, if and when required, e.g., where sub-processors are used. ■

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1   The European Economic Area (EEA) is comprised of the 27 EU Member States (currently Austria, Belgium, Bulgaria, the Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom), Iceland, Liechtenstein, Norway and Switzerland.

2   Commission Decision of 5 February 2010 on Standard Contractual Clauses for the transfer of personal data to Processors established in third countries under Directive 95/46/EC of the European Parliament and of the Council (notified under document C(2010) 593).

3   A Controller is an organization that makes decisions about what information is collected, how it is used, with whom it is shared and where it is processed and is typically the customer. A Processor is an organization that acts on the instructions of a Controller and is typically a service provider.

4   Directive 95/46/EC (the "Directive") restricts cross-border transfers or personal data to third countries outside the EEA that have been found to ensure an "adequate" level of protection. To date, the European Commission has deemed adequate the laws of Argentina, Canada, the Channel Islands (Guernsey and Jersey), the Isle of Man, Switzerland, as well as the United States, where organizations comply with the Safe Harbor accord. The Directive also provides several exceptions that allow for transfers of personal data outside the EEA where there is no "adequacy" determination in place for the relevant jurisdiction, including use of the template Model Clauses.

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